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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 UNITED STATES OF AMERICA,  
12  
13 vs. Plaintiff,  
14 SERGIO BAUTISTA MANZO,  
15 Defendant.  
16

CASE NO. 16cr638-LAB-1 and  
17cv619-LAB

**ORDER DENYING CERTIFICATE OF  
APPEALABILITY AND DENYING  
LEAVE TO AMEND**

17 On April 4, 2017, the Court denied Defendant Sergio Bautista Manzo's petition under  
18 28 U.S.C. § 2255, both on the merits and because in his plea agreement he waived appeal  
19 or collateral attack. Defendant now asks for a certificate of appealability. He also claims he  
20 was unaware he had waived appeal or collateral attack, and blames his attorney for failing  
21 to have the waiver removed from the plea agreement.

22 The Court's earlier denial (Docket no. 36) explains why Defendant's claim is meritless.  
23 Defendant pled guilty to importation of marijuana and was sentenced to 30 months'  
24 imprisonment followed by three years' supervised release. He now claims that his Fifth  
25 Amendment rights were violated when he was questioned at the border. Under settled law,  
26 his guilty plea waived all those alleged defects. *See United States v. Davis*, 452 F.2d 577,  
27 578 (9<sup>th</sup> Cir. 1971). Furthermore, his counsel was not ineffective for failing to challenge the  
28 admissibility of his confession, because there was no trial and no occasion to seek to

1 suppress his statements or to challenge admissibility. Defendant's claim fails on the merits,  
2 and the Court finds no reasonable jurist would find the matter debatable.

3 Defendant also attempts to argue that his own waiver of appeal is evidence of his  
4 counsel's ineffectiveness. The Court liberally construes this as a request for leave to amend  
5 his petition. So construed, his request is denied. First, his only claim fails on the merits, and  
6 waiver is only a secondary reason for its denial. Second, waiver of his meritless claim did  
7 not prejudice him and therefore cannot amount to ineffective assistance of counsel. See  
8 *Knowles v. Mirzayance*, 556 U.S. 111, 123–24 (2009) (citing *Strickland v. Washington*, 466  
9 U.S. 668, 687 (1984)) (holding that a defendant claiming ineffective assistance of counsel  
10 must establish both deficient performance and prejudice). Third, the record belies  
11 Defendant's representation that he did not know about the waiver provision. He signed the  
12 plea agreement, certifying that he had read and understood it, and initialed the pages where  
13 the waiver appears. (Docket no. 1 at 11–13.) Moreover, the magistrate judge's report found  
14 that Defendant understood the waiver provision. (Docket no. 18 at 3:23–27; see also Docket  
15 no. 20 (order adopting the magistrate judge's report).) Finally, the waiver provision is a  
16 standard provision in plea agreements in this District. Asking the government to omit it would  
17 be futile, and defense counsel cannot unilaterally delete it. The request for leave to amend  
18 is **DENIED**.

19 Defendant also asked the Court to extend the time for him to file a notice of appeal.  
20 Because he has already timely filed a notice of appeal,<sup>1</sup> the request is **DENIED AS MOOT**.  
21 See Fed. R. Civ. P. 4(a)(1)(B) (time limit for filing a notice of appeal is 60 days after entry of  
22 the order appealed from, if the United States is a party).

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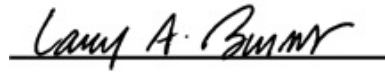
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27 <sup>1</sup> The notice of appeal was submitted for filing on May 30 and is postmarked June 30.  
28 Because Defendant is proceeding *pro se*, he has the benefit of the "prisoner mailbox rule,"  
under which a *pro se* prisoner's notice of appeal is deemed filed when he hands it to prison  
officials for mailing. See *Houston v. Lack*, 487 U.S. 266, 276 (1988).

1 Because reasonable jurists would not find the Court's resolution of his claim  
2 debatable or wrong, and because Defendant waived appeal and collateral attack, a  
3 certificate of appealability is **DENIED**.

4 **IT IS SO ORDERED.**

5 DATED: June 12, 2017

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7 **HONORABLE LARRY ALAN BURNS**  
8 United States District Judge  
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